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1 ROBBINS &amp; GREEN, P.A.

LAW OFFICES

2 3300 NORTH CENTRAL AVENUE

SUITE 1800

3 PHOENIX, ARIZONA 85012-2518

TELEPHONE (602) 248-7600

4 FACSIMILE (602) 266-5369

Wayne A. Smith, #002973

5 Brian Imbornoni, #006894

6 Attorneys for

Respondents

Arizona Corporation Commission  
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## BEFORE THE ARIZONA CORPORATION COMMISSION

9 In the matter of

10 JOHN R. WALLRICH and JANE  
11 DOE WALLRICH, husband and wife,  
12 10742 SW Heron Place  
Beaverton, OR 97007

13 Respondents.

Docket No. S-03506A-02-0000

RESPONSE TO SECURITIES DIVISION'S  
MEMORANDUM OF LAW REGARDING  
EFFECT OF A.R.S. § 44-2031(C)

15 Respondents John R. Wallrich and Jennifer Wallrich ("Respondents"), through their  
 16 attorneys, respectfully submit their response to the Memorandum of Law Regarding Effect of A.R.S.  
 17 § 44-2031(C) ("Memorandum"), filed by the Securities Division ("Division") of the Arizona  
 18 Corporation Commission ("Commission"). Respondents submit that A.R.S. § 44-2031(C) cannot be  
 19 retroactively applied to subject Respondent Jennifer Wallrich to the jurisdiction of the Commission  
 20 and to subject the Wallrich marital community to liability and penalties for securities violations  
 21 allegedly committed by Respondent John R. Wallrich prior to the effective date of the statute.  
 22 Respondents further submit that retroactive application of A.R.S. § 44-2031(C) to the claims alleged  
 23 in this proceeding would violate the prohibition on ex post facto laws contained in the United States  
 24 and Arizona Constitutions. Finally, even if A.R.S. § 44-2031(C) could be retroactively applied to this  
 25 proceeding, the relief requested by the Division as against Respondent Jennifer Wallrich in her  
 26 personal capacity exceeds the jurisdiction of the Commission.

ROBBINS &amp; GREEN, P.A.

1       A.           Factual Background

2               On November 18, 2002, the Division filed its Notice of Opportunity for Hearing  
3       Regarding Proposed Order to Cease and Desist, for Restitution, for Administrative Penalties, and for  
4       Other Affirmative Action ("Notice"). The Division alleges in its Notice that Respondent John R.  
5       Wallrich committed violations of the Securities Act of Arizona, A.R.S. § 44-1801, et seq. ("Securities  
6       Act"), in connection with the sale of investment contracts involving Alpha pay telephones. (Notice,  
7       ¶¶ 12, 17, 22-28.) The Division alleges that these sales occurred between May of 2000 and May of  
8       2001. (Notice, ¶ 17.)

9               In reliance upon A.R.S. § 44-2031(C), the Division has joined Respondent Jennifer  
10       Wallrich as a party to this proceeding. (Notice, ¶ 3.) The Division has requested the entry of a cease  
11       and desist order against Respondents John R. Wallrich and Jennifer Wallrich, and has requested an  
12       order for the payment of restitution and administrative penalties jointly and severally against both  
13       Respondents, and against their marital community. (Notice, § VII, ¶¶ 1-3.)

14               A.R.S. § 44-2031 was amended, effective August 22, 2002, to provide that: "[t]he  
15       commission may join the spouse in any action authorized by this chapter to determine the liability of  
16       the marital community." A.R.S. § 44-2031(C). The effect of this amendment was to provide the  
17       Commission with jurisdiction over the spouse of an alleged violator to determine the liability of the  
18       marital community. (See Memorandum, p. 3, lines 1-4.) The legislative act which amended A.R.S.  
19       § 44-2031 does not provide for retroactive application. See 2002 Ariz. Sess. Laws, Ch. 157.

20       B.           Legal Analysis.

21               1.       Arizona Law Provides a Strong Presumption Against the Retroactive  
22                       Application of Statutory Amendments.

23               A.R.S. § 1-244 provides that, "[n]o statute is retroactive unless expressly declared  
24       therein." A.R.S. § 1-244. See State v. Griffin, 387 Ariz. Adv. Rep. 7, 58 P.3d 516, ¶ 7 (App. 2002).  
25       In other words, "§ 1-244 requires an express statement of retroactive intent before a statute will be  
26       considered retroactive." San Carlos Apache Tribe v. Superior Court, 193 Ariz. 195, 972 P.2d 179, ¶

1 14 (1999). Under § 1-244, “[u]nless a statute is expressly declared to be retroactive, it will not govern  
 2 events that occurred prior to its effective date.” State v. Coconino County Superior Court, 139 Ariz.  
 3 422, 678 P.2d 1386, 1391 (1984).<sup>1</sup>

4 The Division does not cite or even acknowledge the existence of A.R.S. § 1-244 in its  
 5 Memorandum. Instead, the Division argues that A.R.S. § 44-2031(C) may be retroactively applied in  
 6 this proceeding because: (1) this action was commenced after the effective date of the statute; (2) the  
 7 effect of A.R.S. § 44-2031(C) is purely procedural and does not affect substantive rights; and (3) the  
 8 joinder of Jennifer Wallrich in this action is consistent with previously-enacted community property  
 9 laws. (Memorandum, pp. 3-6.) These arguments fail as a matter of law.

10 2. The Division Seeks to Apply A.R.S. § 44-2031(C) Retroactively to the  
 11 Conduct at Issue in this Proceeding.

12 The Division argues in its Memorandum that the Division is not seeking to apply A.R.S.  
 13 § 44-2031(C) retroactively because, “[t]he statute became effective in August, and was already in effect  
 14 when the Division filed the Notice.” (Memorandum, p. 3, lines 17-19.) The Division cites no authority  
 15 for this argument, nor could it. The law is clearly to the contrary.

16 It is well-settled in Arizona that the application of a statute is considered retroactive  
 17 when the statute is applied to conduct which occurred prior to its effective date regardless of the date  
 18 of commencement of proceedings. See State v. Griffin, 58 P.3d at 520 (“We look to the date of the  
 19 offense, rather than the date of adjudication, to determine whether a statute is being retroactively  
 20 applied.”); In re Shane B., 198 Ariz. 85, 7 P.3d 94, ¶ 7 (2000) (“Courts look to the date of the offense,  
 21 rather than the date of adjudication, to determine retroactivity of application.”); State v. Noble, 171  
 22 Ariz. 171, 829 P.2d 1217, 1220 (1992) (“A law is retrospective if it ‘changes the legal consequences  
 23 of acts completed before its effective date.’”); State v. Coconino County Superior Court, 139 Ariz. 422,

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24 <sup>1</sup> Similarly, A.R.S. § 1-246 provides that, in the criminal context, an “offender shall be  
 25 punished under the law in force when the offense was committed.” In addition, A.R.S. § 1-105(B)  
 26 states that, “[w]hen an offense is committed prior to the time these Revised Statutes takes effect, the  
 offender shall be punished under the law in effect when the offense was committed.”

1 678 P.2d 1386, 1391 (1984) ("Unless a statute is expressly declared to be retroactive, it will not govern  
2 events that occurred before its effective date.").

3 Here, the Securities Division is seeking to apply an amendment to A.R.S. §44-2031 that  
4 became effective on August 22, 2002, to subject Respondent Jennifer Wallrich and the Wallrich marital  
5 community to jurisdiction and liability for securities violations that allegedly occurred between May  
6 of 2000 and May of 2001. (See Notice, ¶ 17.) Under well-settled Arizona law, the retroactivity of  
7 application of a statute is determined by the date of the alleged offense rather than the date of the  
8 adjudication. Therefore, the Securities Division's proposed application of A.R.S. §44-2031(C) to this  
9 proceeding would be retroactive regardless of the date of commencement of this proceeding.

10 3. A.R.S. § 44-2031(C) Affects Respondents' Substantive Rights and is  
11 Not Purely Procedural.

12 Under a judicially-created exception to A.R.S. § 1-244, a statute does not have an  
13 impermissible retroactive effect if it is merely procedural and does not affect an earlier established  
14 substantive right. In re Shane B., 7 P.3d at 96, ¶ 8; Bouldin v. Turek, 125 Ariz. 77, 607 P.2d 954  
15 (1979); State v. Griffin, 58 P.3d at 523, ¶ 18. A substantive right is one that creates, defines and  
16 regulates rights while a procedural one prescribes the method of enforcing such rights or obtaining  
17 redress. In re Shane B., 7 P.3d at 97, ¶ 9; State v. Griffin, 58 P.3d at 523, ¶ 18; Allen v. Fisher, 118  
18 Ariz. 95, 574 P.2d 1314, 1315 (App. 1977).

19 Retroactive application of A.R.S. § 44-2031(C) would significantly affect substantial  
20 substantive rights of the Respondents. Under Arizona law, it is well-settled that both spouses must be  
21 joined in an action in order to bind the marital community.<sup>2</sup> Here, the retroactive application of  
22 § 44-2031(C) would expand the rights and authority of the Commission by allowing it to exercise  
23 jurisdiction over both Jennifer Wallrich and the marital community existing between John R. Wallrich

24  
25 <sup>2</sup> See A.R.S. § 25-215(D) ("In an action on such a [community] debt or obligation the spouses  
26 shall be jointly sued . . ."); Spudnuts, Inc. v. Lane, 139 Ariz. 35, 676 P.2d 669, 670 (App. 1984)  
(judgment against one spouse does not bind the community); Eng v. Stein, 123 Ariz. 343, 599 P.2d 796,  
799 (1979) (spouse must be joined in action to foreclose community interest in real property).

1 and Jennifer Wallrich. This would have the effect of subjecting Respondents to new exposure and  
2 liability that did not exist at the time of the conduct alleged by the Division. This goes far beyond  
3 prescribing the method of enforcing legal rights, but instead, creates, defines and regulates new rights  
4 in favor of the Securities Division and against Respondents. The application of A.R.S. § 44-2031(C)  
5 to this action would affect Respondents' substantive rights, and therefore, is an impermissible violation  
6 of A.R.S. § 1-244.

7         The present case is analogous to numerous Arizona cases which have refused to extend  
8 retroactive application to statutory amendments affecting the measure of damages or the liability of a  
9 party as the result of conduct which occurred before the date of the statutory amendment. See Aranda  
10 v. Industrial Com'n of Arizona, 198 Ariz. 467, 11 P.3d 1006, ¶ 27 (2000) (statute authorizing  
11 suspension of workers' compensation benefits to individuals convicted of crime and incarcerated is  
12 substantive and not procedural); Bouldin v. Turek, 125 Ariz. 77, 607 P.2d 954, 955 (1979) (statute  
13 providing for award of attorneys' fees is substantive and not procedural); State v. Griffin, 387 Ariz.  
14 Adv. Rep. 7, 58 P.3d 516, ¶ 29 (App. 2002) (statute creating status of prohibited possessor of firearms  
15 affects substantive rights); State v. Beasley, 198 Ariz. 559, 12 P.3d 234, ¶ 20 (App. 2000) (statute  
16 creating chronic felony offender status was substantive and not procedural); E.C. Garcia and Co., Inc.  
17 v. Arizona State Dept. of Revenue, 178 Ariz. 510, 875 P.2d 169, 178 (App. 1993) (statute rescinding  
18 right to refund of taxes paid under erroneous assessment affects substantive rights); Allen v. Fisher,  
19 118 Ariz. 85, 574 P.2d 1314, 1316 (App. 1977) (statute abrogating collateral source rule in medical  
20 malpractice actions is substantive and not procedural).

21         In the instant case, the retroactive application of A.R.S. § 44-2031(C) to this proceeding  
22 would subject Respondent Jennifer Wallrich to the jurisdiction of the Commission, and would expose  
23 the Respondents' marital community to a claim for administrative penalties and other liabilities  
24 pursuant to A.R.S. §§ 44-2032(1) and 44-2036(A). Because this jurisdiction and liability would not  
25 exist but for the recent amendment to A.R.S. § 44-2031(C), the effect of that amendment is substantive  
26 rather than procedural and cannot be retroactively applied. A.R.S. § 1-244.

1                   4.     The Joinder of Jennifer Wallrich in this Action Was Not Permissible  
2                             Under Arizona's Community Property Laws Prior to the Enactment of  
3                             A.R.S. § 44-2031(C).

4                   The Division argues in its Memorandum that substantive law is not being retroactively  
5 applied because, "[t]he marital community's liability for actions of one spouse is governed by  
6 Arizona's community property statutes." (Memorandum, p.5, lines 8-9.) This begs the question,  
7 however, of whether Respondent Jennifer Wallrich and the Wallrich marital community were liable  
8 for the claims alleged in this proceeding prior to the enactment of A.R.S. § 44-2031(C). Because the  
9 Commission previously had no jurisdiction over the spouse of an alleged violator, A.R.S. § 44-2031(C)  
10 creates new liability for conduct which allegedly occurred prior to the enactment of the statute.

11                   It is well-settled in Arizona that, "[t]he Corporation Commission has no implied powers  
12 and its powers do not exceed those to be derived from a strict construction of the Constitution and  
13 implementing statutes." Commercial Life Ins. Co. v. Wright, 64 Ariz. 129, 166 P.2d 943 (1965). See  
14 also Kendall v. Malcolm, 98 P.2d 329, 404 P.2d 414, 417 (1965) ("We have held that the Corporation  
15 Commission of Arizona has no implied powers."); Burlington v. Arizona Corp. Com'n, 198 Ariz. 604,  
16 12 P.3d 1208, ¶ 11 (App. 2000) ("Despite the Commission's argument to the contrary, the Commission  
17 has no implied powers, and its powers do not exceed those derived from a strict construction of the  
18 Constitution and the implementing statutes.").

19                   While the Commission's specific constitutional power over the sale of securities is  
20 limited to inspection and investigation, Ariz. Const., art. 15, § 4, the legislature may enlarge or extend  
21 the powers and duties of the Commission over the subject matter of which it has already been given  
22 jurisdiction. Ariz. Const., art. 15, § 6; Commercial Life Ins. Co., 106 P.2d at 950. Where, as here, the  
23 Commission's authority does not come from the Constitution, but rather from the legislature, the courts  
24 will not imply any power beyond that expressly bestowed by the statute. Burlington, 12 P.3d at 1210,  
25 ¶ 11.

26                   In the instant case, the jurisdiction and authority of the Commission derive from A.R.S.  
§ 44-2032, which provides in relevant part that:

If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is about to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the commission under this chapter, the commission may, in its discretion:

1. Issue an order directing such person to cease and desist from engaging in the act, practice or transaction, or doing any other act in furtherance of the act, practice or transaction, and to take appropriate affirmative action within a reasonable period of time, as prescribed by the commission, to correct the conditions resulting from the act, practice or transaction including, without limitation, a requirement to provide restitution as prescribed by rules of the commission.

A.R.S. § 44-2032(1) (Emphasis added).<sup>3</sup>

A.R.S. § 44-2032(1) provides the Commission with authority to issue cease and desist orders, and to order the payment of restitution and penalties, as against the person that has allegedly engaged in, is engaging in, or is about to engage in securities violations. The statute conveys no jurisdiction or authority over the spouse of an alleged violator, and none can be implied under established Arizona law. Accordingly, prior to the enactment of A.R.S. § 44-2031(C), the Commission had no express or implied jurisdiction over the spouse of an alleged violator, and no power or authority to issue orders binding on the marital community. Because A.R.S. § 44-2031(C) granted those powers to the Commission after the conduct and events at issue in this proceeding, the retroactive application of that statute would affect the substantive rights of Respondents and be manifestly unfair.

5. The Retroactive Application of A.R.S. § 44-2031(C) in this Action Would Also Violate the Prohibition on Ex Post Facto Laws Contained in the United States and Arizona Constitutions.

The United States and Arizona Constitutions prohibit ex post facto laws. See U.S. Const. art. I, § 9; Ariz. Const., art I, § 10. A state may enact no law, "that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed." State v. Noble, 171

<sup>3</sup> Although the language of A.R.S. § 44-2032(1) quoted above was amended by 2002 Ariz. Sess. Laws, Ch. 157, § 15, effective August 22, 2002, those changes are minor and are not material to the issues presently before the Commission.

1 Ariz. 171, 173, 829 P.2d 1217, 1219 (1992) (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed.  
 2 648 (1798)). See also Saucedo v. Superior Court in and for the County of La Paz, 190 Ariz. 226, 946  
 3 P.2d 908 (App. 1997).<sup>4</sup>

4 When engaging in ex post facto analysis, the first issue to consider is whether an  
 5 enactment is being retroactively applied. See Noble, 829 P.2d at 1220; Saucedo, 946 P.2d at 910. "A  
 6 law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'"  
 7 Noble, 829 P.2d at 1220 (quoting Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351  
 8 (1987)). See also State v. Yellowmexican, 142 Ariz. 205, 688 P.2d 1097, 1099 (App.1984) (a law is  
 9 retroactive if it "appl[ies] to events occurring before its enactment"). In the instant case, this  
 10 requirement is clearly satisfied. The Securities Division seeks to apply an amendment to A.R.S. § 44-  
 11 2031 that became effective on August 22, 2002, to events that allegedly occurred in May of 2000  
 12 through May of 2001. (See Notice, ¶ 20.)

13 The next issue to consider is whether the statutory amendment being retroactively  
 14 applied is "punitive or regulatory." See Noble, 829 P.2d at 1221; Saucedo, 946 P.2d at 910. If the  
 15 enactment is "punitive either in purpose or effect," it may not be retrospectively applied. See Noble,  
 16 829 P.2d at 1221; Saucedo, 946 P.2d at 910. Here, the retroactive application of A.R.S. § 44-2031  
 17 subjects Respondent Jennifer Wallrich and the marital community of Respondents John R. Wallrich  
 18 and Jennifer Wallrich to various statutory liabilities, including the administrative penalties imposed  
 19 by A.R.S. § 44-2036(A). The punitive effect of those penalties is clear.

20 A.R.S. § 44-2036(A) provides that any person found, in an administrative action, to  
 21 have violated any provision of the Securities Act, "may be assessed an administrative penalty by the  
 22

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23 <sup>4</sup> The issue of whether a statute is an ex post facto law, although of constitutional proportion,  
 24 is generally not reached by the courts if it is determined that the statute violates the mandate of § 1-244.  
 25 See Coconino County Superior Court, 678 P.2d at 1391 (court declines ex post facto analysis when  
 26 case can be decided on alternate state law ground of § 1-244); State v. Fallon, 151 Ariz. 188, 726 P.2d  
 604, 605, n. 1 (App.1986) (unnecessary to reach constitutional question of ex post facto violation  
 because case could be decided on alternate state law ground of § 1-244).



commission, after a hearing, in an amount of not to exceed five thousand dollars for each violation.”  
 A.R.S. § 44-2036(A).<sup>5</sup> The effect of multiplying the amount of the penalty by the number of violations greatly elevates the punitive effect of the penalty, and turns the focus of the assessment on the conduct of the alleged violator rather than the harm, if any, to the public. The payment of monetary penalties has historically been regarded as punishment and is commonly employed as a criminal sanction either in lieu of or in addition to incarceration. The payment of monetary penalties is also consistent with the traditional goals of punishment; namely, retribution and deterrence. Most importantly, the penalties prescribed by A.R.S. § 44-2036(A) do not serve any regulatory or remedial purpose because the monies collected by the Commission are remitted to the State Treasurer for deposit in the state general fund. A.R.S. § 44-2036(B).

Accordingly, because the sanctions and penalties sought to be imposed by the Securities Division against Respondent Jennifer Wallrich, and against marital community between Respondents John R. Wallrich and Jennifer Wallrich, are being retroactively applied and are punitive in both purpose and effect, the application of A.R.S. § 44-2031(C) to this proceeding would violate the prohibition on ex post facto laws contained in the United States and Arizona Constitutions.

6. The Relief Requested by the Division Would Exceed the Jurisdiction of the Commission Even if A.R.S § 44-2031(C) Could Be Retroactively Applied.

A.R.S. § 44-2031(C) provides that, “[t]he commission may join the spouse in any action authorized by this chapter to determine the liability of the marital community.” A.R.S. § 44-2031(C) (Emphasis added). The statute, therefore, does not grant the Commission general personal jurisdiction over the spouse of an alleged violator, but instead, allows joinder of the spouse for the limited purpose of determining the liability of the marital community. Consistent with this limited statutory authority, the Division concedes in its Memorandum, albeit in a footnote, “that Jane Doe Wallrich was joined in the action solely to determine the liability of the marital community of Wallrich and Jane Doe

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<sup>5</sup> The Division has alleged that Respondent John R. Wallrich has sold Alpha investment contracts involving at least 138 telephones to at least 28 individuals or entities, and will likely argue that each sale constituted a violation of the Securities Act. (Notice, ¶ 17.)

1 Wallrich for the actions of Wallrich.” (Memorandum, p.2, fn. 1.) The relief requested by the Division  
2 its Notice, however, far exceeds the limited authority granted by A.R.S. § 44-2031(C).

3 The Division’s Notice alleges in ¶ 3 that Respondent Jane Doe Wallrich, “is joined in  
4 this action, pursuant to A.R.S. § 44-2031(C), to determine the liability of the marital community for  
5 the violations alleged herein.” (Notice, § II, ¶ 3.) The Division’s requested relief, however, includes  
6 the entry of a cease and desist order against Respondent Jennifer Wallrich personally, together with  
7 the entry of orders for payment of restitution and administrative penalties jointly and severally against  
8 both Respondents and against their marital community. (Notice, § VII, ¶¶ 1-3.)

9 To the extent that the Division’s Notice seeks to impose the entry of a cease and desist  
10 order against Respondent Jennifer Wallrich in her personal capacity, and to the extent that the Notice  
11 seeks to recover awards of either restitution or administrative penalties from the separate assets and  
12 estate of Jennifer Wallrich, the Division has exceeded the authority granted in A.R.S. § 44-2031(C)  
13 and the jurisdiction of the Commission. Therefore, even if A.R.S. § 44-2031(C) could be retroactively  
14 applied in this action, the relief requested by the Division as against Respondent Jennifer Wallrich,  
15 beyond the determination of community liability, must be denied.

16 C. Conclusion.

17 Accordingly, Respondents submit that A.R.S. § 44-2031(C) cannot be retroactively  
18 applied to subject Respondent Jennifer Wallrich to the jurisdiction of the Commission and to subject  
19 the Wallrich marital community to liability and penalties for securities violations allegedly committed  
20 by Respondent John R. Wallrich prior to the effective date of the statute. Respondents further submit  
21 that retroactive application of A.R.S. § 44-2031(C) to the claims alleged in this matter would violate  
22 the prohibition on ex post facto laws contained in Article I, Section 9 of the United States Constitution  
23 and Article I, Section 10 of the Arizona Constitution. Finally, even if A.R.S. § 44-2031(C) could be  
24 retroactively applied to this case, the relief requested by the Division as against Respondent Jennifer  
25 Wallrich exceeds the jurisdiction of the Commission. Respondents therefore submit that the claims  
26 alleged by the Division as against Respondent Jennifer Wallrich should be dismissed.

1 DATED this 18th day of February, 2002.

2 ROBBINS & GREEN, P.A.

3 By: 

4 Wayne A. Smith  
5 Brian Imbornoni  
6 3300 N. Central Avenue, Suite 1800  
7 Phoenix, AZ 85012  
8 Attorneys for Respondents

9 Original and 13 Copies hand-delivered  
10 this 18th day of February, 2003, to:

11 Docket Control  
12 ARIZONA CORPORATION COMMISSION  
13 1200 West Washington  
14 Phoenix, AZ 85007

15 Copy hand-delivered this 18th day of  
16 February, 2003, to:

17 Hon. Philip J. Dion III  
18 Administrative Law Judge  
19 ARIZONA CORPORATION COMMISSION  
20 1200 West Washington  
21 Phoenix, AZ 85007

22 Moira McCarthy  
23 Assistant Attorney General  
24 ARIZONA ATTORNEY GENERAL'S  
25 OFFICE  
26 1275 W. Washington Street  
Phoenix, AZ 85007

Kathleen Coughenour DeLaRosa  
SECURITIES DIVISION  
1300 West Washington, 3rd Floor  
Phoenix, AZ 85007

Mark Sendrow, Director  
SECURITIES DIVISION  
1300 West Washington, 3rd Floor  
Phoenix, AZ 85007



ROBBINS & GREEN, P.A.